

Arbitrator's Case
No. 7-24-00

C. ALLEN POOL
Labor Arbitrator
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IN ARBITRATION PROCEEDINGS PURSUANT
AGREEMENT BETWEEN THE PARTIES

Portland Police Association)	
)	ARBITRATOR'S
and)	
)	
City of Portland, Oregon)	OPINION AND AWARD
)	
Issue: Contract Interpretation)	<i>October 31, 2000</i>
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This Arbitration arose pursuant to Agreement between the Portland Police Association, hereinafter referred to as the "Union", and the City of Portland, Oregon, hereinafter referred to as the "City", under which C. ALLEN POOL was selected by the parties to serve as Arbitrator through procedures of the OREGON EMPLOYMENT RELATIONS BOARD. The Parties stipulated that the matter was properly before the Arbitrator and that his decision would be final and binding.

The hearing was held in Portland, Oregon on July 24, 2000 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and arguments. The witnesses were duly sworn and a written transcript was made of the hearing. Posthearing briefs were received in a timely manner (October 16, 2000) thereby bringing the hearing to closure.

APPEARANCES BY COUNSEL

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ISSUE

Unable to agree on how to frame the issue, the parties authorized the Arbitrator to frame the issue as determined from the record. The parties respective Statements were:

Union's Statement of the Issue

“Did the City of Portland violate the collective bargaining agreement when it instituted a mandatory on-call system for supervisory sergeants in September, 1999? If so, what shall be the remedy?”

City's Statement of the Issue

“Did the City violate Article 3 of the 1996-99 collective bargaining agreement when it assigned supervisory sergeants after hours call triaging responsibilities on a rotating basis? If so, what is the appropriate remedy?”

ARBITRATOR'S STATEMENT OF THE ISSUE

Did the City violate the 1996-1999 Collective Bargaining Agreement when it assigned supervisory sergeants after-hours call triaging responsibilities on a rotating basis? If so, what is the appropriate remedy?

BACKGROUND

The events leading to this arbitration began in 1966 when the City's Bureau of Police made the decision to merge/combine the positions of Detective and Sergeant within the Bureau's Detective Division. The two positions were equal in rank and pay and the resulting merger left one position, Sergeant. However, their respective functions and responsibilities did not change; namely that of that of investigative, detective work for specific crimes.

The organizational structure of the Detective Division, then and now, is about the same. The Division commander is a Captain who reports to the Bureau Chief. Directly subordinate to the Captain are Lieutenants that supervise various sections within the Division. Next in the hierarchy are Supervisory Sergeants who assign and supervise the work of Investigative Sergeants within the Sections. Supervisory Sergeants and the

Investigative Sergeants are equal in rank. They both members of the Union's bargaining unit. Though the two receive the same compensation, Supervisory Sergeants receive a 3% premium for their role as supervisory sergeant.

Supervisory Sergeants perform an essential role in what was characterized as a Triage System. When a crime is committed, the presence of an Investigative Sergeant may or may not be required at the crime scene. It depends on the nature and type of incident and the circumstances.

When a patrol officer, usually a uniformed sergeant, believes an investigator may be needed, he/she will call the Detective Division where a Supervisory Sergeant will assess the situation and make a determination whether to dispatch an Investigative Sergeant to the scene. If it is determined that the presence of an Investigative Sergeant is required or needed, the Supervisory Sergeant will assign an investigator to the crime scene. It is the process of assessing and determining whether an investigator is required or needed at the crime scene that constitutes the Triage System.

The second event of significance was the Bureau's decision in April of 1998, triggered by budget cuts, to eliminate one of three shifts within the Detective Division, specifically the graveyard shift that operated between 12 midnight and 7:30¹ a.m. That decision left the Detective Division with the task of performing its responsibilities with two shifts. However, crime does not stop with the clock and the Detective Division was still mandated to provide investigative services between the hours of 12 midnight and 7:30 a.m.

To cover the hours of 12 midnight and 7:30 a.m., Division Captain Greg Clark

¹ There was a question raised whether the shift ended at 7:00 a.m. or 7:30 a.m. However, the question was not material to the issue.

instituted a Triage System for those hours that would be provided by the four Lieutenants in the Division. A weekly, rotating schedule was established whereby one of the four Lieutenants would be assigned for a week at a time to the after-hours of midnight to 7:30 a.m. to provide triage services as needed via the telephone. The assigned Lieutenant responds to calls requesting assistance. The Lieutenant will assess the situation and make a determination whether an Investigative Detective should respond to the incident. Captain Clark's memo specified the criteria for triaging, determining if an Investigative Sergeant should respond:

“Generally detectives will respond to the following incidents:

- Homicides
- Officer involved uses of deadly physical force, regardless of injury
- Questionable deaths
- All Measure 11 custody's (Rob I, Assault I etc.)
- Rapes
- Major assaults where immediate follow-up is needed, or the complexity of the crime scene is such that it would be beneficial to have a detective on-scene.”(Employee Exhibit No. 3)

In January of 1999, Captain Suzanne Sizer took command of the Detective Division. On assuming command, a number of concerns about how the after-hours Triage System using the Lieutenants were brought to her attention. She immediately began an examination and analysis of the after-hours Triage System.

At about the same time, another problem, unrelated at the time to the issue in this arbitration, manifested itself. As a result of some changes in accounting procedures within the Bureau, a number of grievances (about 50) were filed concerning overtime. The City and the Union met and reached a Settlement Agreement dated February 12, 1999. The first sentence of Paragraph No. 1 of the Agreement read as follows: “The terms of this agreement *shall set precedent in similar situations* as long as the current collective bargaining agreement (1996-1999) remains in effect (Emphasis added).

Paragraph No. 13 addressed the question of how to compensate officers who received work-related telephone calls while off-duty. The language of paragraph 13 read, “If the City makes a work-related telephone call to an employee at home outside of regular work hours, the employee shall be compensated for the actual time worked on the telephone call, rounded up to the nearest hour”² (Employer Exhibit No. 15, p. 1 & 6).

In an Inter-Office Memo to Captain Sizer dated February 22, 1999, Lt. Schwartz submitted a status report on the use of the four Lieutenants to provide after-hours Triage between 12 midnight and 7:00 a.m. His report, among other things, identified the problem of not having enough detectives on the voluntary list for call-out during the hours of 12 midnight and 7:00 a.m. The report also contained a statement revealing why only lieutenants were assigned to the after-hours rotating triage system: “*Due to contractual issues concerning overtime, lieutenants were tasked with taking calls during non-coverage hours and making decisions on the appropriate response*” (Emphasis added. Employer Exhibit No. 4, p. 2).

In the next month, March, the Detective Division was subjected to another reorganization that aggravated the problem. One of the four lieutenants was taken away from the Division. That left only three lieutenants available for assignment to the rotating after hours-triage system.

Meanwhile, Captain Sizer continued with the examination and analysis of the after-hours triage system. There were a number of individual conversations, exchanges of memos, and staff meetings regarding the triage system (Employer Exhibits 5 and 6).

² That same issue was a subject of negotiations and the above language, with minor modifications, was agreed to by the parties and became part of the current collective bargaining agreement (CBA), namely Article 43.16.

The record did not show that Capt. Sizer discussed the matter directly with the Supervisory Sergeants. On August 18, 1999, a staff meeting was held. The agenda included an announcement by Captain Sizer that Supervisory Sergeants would be included in the rotating triage system. Captain Sizer's copy of the Agenda contained a handwritten note stating, "*advised Sgts. of changes to call out system*" (Employer-8) (Emphasis added). She testified that she made the announcement but did not discuss the "parameters".

On August 24, 1999, Captain Sizer distributed the after-hours rotating triage schedule for September 1999 through January 2000. The schedule, for the first time, included Supervisory Sergeants. Details and instructions did not accompany the schedule. She testified that discussions were held with individuals concerning the use of alcohol, pagers, telephones, beach homes, etc. with the bottom line being "just be within pager range". There was no written policy in effect at the time nor had one been written at the time of this arbitration. Capt. Sizer communicated two general expectations that supervisory sergeants must meet. First, you must respond to the page. Second, you must not be impaired to the point where you are unable to exercise good judgment when you respond to the page (City Brief-16).

On September 28, 1999, the Union learned of the "mandatory on-call system" and filed a grievance the next day, September 29th (Employer-1). On September 30th, Captain Sizer sent a memo to Assistant Chief Dennis Merrill informing him that the change in the system had been implemented on Wednesday, September 29th at 0000 hours.

Captain Sizer's reasons for the change were that the Supervisory Sergeants knew how to do the job; triaging was part of their normal duties on their regular shift. The other reason was that the three lieutenants were "burned out". She also reported to

Captain Merrill, her superior, that a method of compensation was provided through the Settlement Agreement with the Union dated February 12, 1999 (Employer-10).

The Union's grievance was processed and proceeded to this Arbitration.

POSITION OF THE UNION

The City violated the CBA when it unilaterally instituted a mandatory after-hours on-call system that included Supervisory Sergeants on the schedule. Article 3 of the CBA requires that "Standards of employment" be maintained "at not less than the level in effect at the time of the signing of this Agreement". By its action, the City substantially changed wages, hours, and working conditions for Supervisory Sergeants. Article 3 – Existing Standards bars such unilateral action by the City. The City had a duty to negotiate before assigning supervisory Sergeants to an on-call status.

The Grievance should be sustained. The Arbitrator should rescind the mandatory on-call system and make whole Supervisory Sergeants who served on on-call status. They should be compensated at a rate of pay the arbitrator deems appropriate for all hours assigned to on call duty exclusive of the hours actually worked for which payment has already been made.

POSITION OF THE CITY

The City did not violate the CBA in making the decision to assign Supervisory Sergeants to perform call-triaging responsibilities after regular hours on a rotational basis. Article 2 – Management Rights recognizes the City's retention of the exclusive right to exercise the customary functions of management. This includes determining the level of service, methods of operation, work schedules, and assignment of work. Nor is the Management Rights provision of the CBA abridged by Article 2 – Maintenance of Standards provision. Moreover, a lessening of a standard did not occur; and, the call-

triaging system is not an on-call system. The Union also waived its right to bargain the issue when it elected not to bring the matter to the negotiation for the current CBA but to allow the matter to be resolved through the arbitration process. The Grievance should be denied.

DISCUSSION

Throughout the hearing and the throughout the evidence record, the Union repeatedly referred to the after-hours triaging system as an “on-call” system. The Union’s understanding and use of the term was incorrect. Within the context of labor relations, industrial relations or whatever one labels it, the term “on-call” has a precise and legal definition. A regulation issued under the FLSA articulates very clearly the criteria for an “on-call” system. To paraphrase the regulation, an “on-call” employee is required to remain either on the premises or be so close to the work site that he/she cannot use time effectively for his/her own purposes. However, if the employee is not required to remain on or nearby the employer’s premises but is merely required to leave word where he/she may be reached the employee is not working while on call (City Brief p. 17).

The Roberts’ Dictionary of Industrial Relations, 3rd Ed., Bureau of National Affairs, Inc, 1986 mirrors the FLSA criteria with its’ definition of “on-call time pay”. It’s “A method of compensation whereby individuals are paid for the time during which they are ‘on call’ or on standby, ready and able to go to work. These individuals are paid on a call time plan rather than for the actual time worked”.

The City’s after-hours call triaging system is not an on-call system. The supervisory sergeants placed on schedule for one week every ten or eleven weeks are free to go about their normal, usually activities when off duty. For the one-week period,

though, they are required, while off duty, to respond to a page or telephone and not be impaired to the point where they would be unable to exercise good judgment after responding to the page (City Brief p. 16).

The evidence record did highlight some technical problems with the system. These problems are mostly a result of the shortcomings of available technology related to pagers, cell phones, and radios and how well they work in Oregon's mountainous terrain. However, these are shortcomings for which accommodations can probably be reached.

The Union made very clear that the sole purpose of this grievance was to address the City's unilateral institution of a mandatory system whereby supervisory sergeants are included in the rotating after-hours triaging system (Union Brief-4). The contention was that unilateral acts by the City which affect mandatory subjects of bargaining are prohibited by the CBA and that the City must first negotiate the matter. The evidence record did not support the Union's position.

First, the Union argued that the City violated Article 3, Existing Standards. However, the Union offered nothing into the evidence record to show that the City, by its actions, "lessened" a particular standard of employment. Second, Article 2, Management Rights clearly sets forth the City's right, absent expressed prohibitions in the CBA or an established past practice, to mandate that supervisory sergeants be included in the rotating after-hours call triaging schedule.

The City's rationale for inclusion of supervisory sergeants was persuasive. The City is required, as a vital service to the public, to provide call triaging services during the hours of midnight and 7:30 a.m. For months, the City provided this service with a rotating weekly schedule using four lieutenants and then with three lieutenants. However, when the number of lieutenants in the Division fell to three lieutenants, a real

problem manifested itself and the need to modify the system became a necessity. With only three lieutenants available, the City obviously could not meet the need to provide an effective after-hours call triaging system between midnight and 7:30 a.m. Budget restrictions prevented the restoration of a third shift and the evidence record showed nothing to support the idea that a volunteer program for inclusion of supervisory sergeants would be effective. Moreover, since triaging was a duty performed by supervisory sergeants during their regular shift, it was only appropriate that they be included as a necessity means to continue providing the public with this vital service.

The City's decision was obviously based on an operational need. Therefore, there was no violation of the 1996-1999 CBA. The City had the right to include the supervisory sergeants in the triage system. Moreover, the Settlement Agreement dated February 12, 1999 provided a basis, a precedent for compensating the supervisory sergeants for the work-related telephone calls taken while assigned to the after-hours triage system.

Subsequent to the inclusion of supervisory sergeants in the triage system, negotiations for the current CBA commenced in the fall of 1999. During negotiations, the Union informed the City it would not be making any proposal regarding the issue in this instant case because it believed the matter would be resolved through the grievance procedure (Tr. 233 & Union Brief-15). The decision not to make a proposal during negotiation was the Union's to make. The Union's reasons for this choice were not made known to this arbitrator. However, it is clear to the arbitrator that the Union could have offered a proposal concerning the matter, and if a proposal had been offered, the matter could very well have been resolved through the collective bargaining process.

Though the mandatory system was not a subject of negotiations, the question of

compensating officers for responding to work-related telephone calls after work hours was discussed during negotiations and an agreement was reached by the parties. In essence, the Union and City took the intent and the language of the Settlement Agreement of February 12, 1999 and memorialized it in the current CBA, namely Article 43.6, Work-related Telephone Calls.

In summary, the City's decision to include supervisory sergeants in the after-hours triage system did not violate the 1996-1999 CBA. The City exercised its right under Article 2, Management Rights, to institute a method of operation and a work schedule that was appropriate to meet the need of continuing to provide an effective after-hours triage system. Nor did the City violate Article 3, Existing Standards. No "standard of employment" was "lessened". The Union, albeit it after the system was implemented, did have an opportunity to negotiate the matter with the City but declined the opportunity. Instead, the Union chose to continue the pursuit of a resolution of the matter through the grievance process, this arbitration.

For the reasons discussed in the foregoing, the Arbitrator's conclusion is that the City did not violate the Collective Bargaining Agreement. The grievance is denied.

AWARD

The Grievance is denied. The City did not violate the 1996-1999 Collective Bargaining Agreement when it assigned supervisory sergeants after-hours call triaging responsibility on a rotating basis.

Date: _____

C. ALLEN POOL
Arbitrator